

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition to Establish Procedural)	Docket No. WC 07-267
Requirements to Govern Proceedings for)	
Forbearance under Section 20 of the)	Docket No. FCC 07-202
Communications Act of 1934, as Amended)	

**THE COMMENTS OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) files these Comments (“PaPUC Comments”) addressing the Federal Communications Commission’s (“FCC”) Public Notice of Proposed Rulemaking on Forbearance (“Forbearance NPRM”) at WC Docket No. 07-267 and FCC Docket No. 07-202. The Forbearance NPRM was released on November 30, 2007 and published in the *Federal Register* on February 6, 2008 beginning at Page 6888.

The FCC requests input on several issues. These are (1) the scope and applicability of forbearance under 47 U.S.C. §§ 160 (forbearance) and 332 (Commercial Mobile Radio Services (CMRS) or wireless); (2) the need for procedures to govern forbearance petitions, notice and comment processes; (3) a “complete as filed” requirement similar to Section 271 proceedings, and (4) whether the FCC should specify certain information as necessary to make a

prima facie showing that forbearance is appropriate. The FCC also seeks comment on (5) the burden of proof; (6) requirements to document compliance with each component of any forbearance test, (7) the use of protective orders; and (8) procedures involving state commission input.

Finally, the FCC seeks comment on (9) the management of timelines under the Section 160 deadline of one year for a decision absent an extension; (10) whether a written order is a requirement for all Section 160 proceedings, and (11) the advisability of applying any process requirements to pending proceedings.

The PaPUC Comment is confined to process issues. The PaPUC addresses the interplay of Sections 160 and 332 of the Communications Act of 1934, as amended and suggests that the procedures used for Section 160 Forbearance Petitions should apply to Section 332 actions. The PaPUC Comments do not address the applicability of the federal Administrative Procedures Act (APA). The PaPUC may address this issue following review of other filed Comments.

THE PaPUC COMMENTS

Summary of the Comments.

The PaPUC urges the FCC to establish the data, information, and documentation

requirements that a Petitioner must file when seeking forbearance. The FCC should do a cursory review to determine if the appropriate documentation is attached to the filing. All the Petitioner's data, information, and documentation should be filed at one time in a complete filing.

Thereafter, the FCC should review the Petition for completeness and determine if the Petitioner establishes a *Prima Facie* showing that forbearance may be appropriate. If a Petition is complete and establishes a *Prima Facie* case, the FCC should then publish notice in the Daily Digest and the Federal Register that the FCC has "received" an application under Section 160(c). The PaPUC proposes this alternative consistent with MACRUC's Comments which identify alternatives like separating the "completeness" and "*Prima Facie*" reviews.

In that publication, the FCC should give state commissions a time period for expressing their concerns with any forbearance petition. The FCC's Notice of Receipt published in the Daily Digest and Federal Register should set Comment and Reply Comment periods of 90 or 120 days. The FCC should establish a State Response period that ends 30 days after the Reply Comments. Finally, the interested public should be allowed to file a Reply to the State Response 30 days after the filing of any State Response.

Subsequently, the FCC would evaluate the evidence and issue a written determination from Day 150 to Day 365, unless extended 90 days

under Section 160(c).

If any supplemental filings are filed by the Petitioner, except for erratum and filings that do not contain substantive information, the Section 160(c) timeline should automatically be “reset” by the FCC. In those instances, the FCC should reissue a Notice of Receipt that the supplemental filing and the former filing constitute a new filing that the FCC received under Section 160(c).

Additionally, there should be a written order for every forbearance petition, including ones already decided or pending at the FCC.

Finally, no forbearance decision at the FCC should operate to limit a state commissions’ authority under independent state law. The limitation on state commission authority in Section 160(e) operates to limit the state commissions’ exercise of federal authority, similar to the FCC’s use of delegated authority in numbering. Section 160(e) does not provide the FCC with legal authority to preempt state law not otherwise provided for in the Communications Act of 1934, as amended. The FCC should expressly make that observation when granting any forbearance relief.

Extended Discussion.

1. *A “Complete as Filed” Requirement.* The FCC has not

established what it means to “receive” a filing under Section 160(c). The PaPUC recommends that the minimum filing requirement be enough data, information, and supporting documentation sufficient to address the three-pronged test for forbearance set out at 47 U.S.C.S. § 160(a)(1)-(3) or 332(c)(1)(A). Additionally, the PaPUC suggests a procedural requirement in which the FCC “receives” a Forbearance Petition only after the Petitioner has submitted the known and accessible information, data, and supporting documentation addressing the forbearance criteria set out in Section 160(a)(1)-(3) or Section 332(c)(1)(A), respectively.

The FCC’s regulations should identify what constitutes reasonably available data, information, and supporting documentation. The Petitioner must submit the information in order for a Petition to be deemed “complete” as filed.

In situations where a Petitioner seeks forbearance throughout a state, region or Metropolitan Statistical Area (MSA), the Petitioner should be required to submit the information, data, and supporting documentation on a wire-center basis if the Petitioner is a Local Exchange Carrier (LEC). Other Petitioners should also be required to submit the appropriate information, data, and supporting documentation relevant to the scope of their proposed Forbearance Petition.

In both instances, the FCC should not deem a Petition to be “complete

as filed” unless all the information is put forth in the Petition at the time of filing. The FCC should dismiss as “incomplete” or “not received” any Petition that fails to submit the required supporting documentation. The PaPUC thinks that requiring a Petitioner to file its information at one time, up front, at the beginning of a proceeding is a more efficient way of conducting forbearance proceedings.

Currently, there is no obligation to provide state commissions with notice of, or information contained in, a Petitioner’s filing. The PaPUC does not think that publication in the Daily Digest or daily perusal of the FCC Docket should be the only of notice of important federal proceedings that impact the state commissions. All parties to a forbearance proceeding benefit from requiring that the Petitioner’s filing must be complete as filed and that the state commissions be provided with a copy of the filing.

The states and the parties would know the information, data, and supporting documentation that need to be addressed in determining the extent of their involvement. In particular, a state commission would have the information for their respective state, region, or territory.

All parties would further benefit from a requirement that “additional filings” be subject to the same requirement. In that case, a new filing that contains substantial additional data, information, or supporting documentation must also be provided to the state commissions. An

“additional filing” that is an erratum or does not contain substantially new information would be a discrete exception. This includes the original Petition and any supplemental *Ex Parte* filings.

The PaPUC makes these recommendations based on our experience with the recent Verizon Forbearance Petition at WC Docket No. 06-172 (the “Philadelphia-Pittsburgh Petition”) and WC Docket No. 04-440 (the “Deemed Granted by Operation of Law” Forbearance). In those proceedings, the parties and the Petitioner made multiple filings, *Ex Parte* submissions, and even sought confidential treatment for relevant data and information.

Moreover, unlike the statutes in some states, federal law allows parties to submit *Ex Parte* filings and seek confidential treatment for filings made after expiration of a formal period. This is not a regulatory option in Pennsylvania. Pennsylvania has strict prohibitions against *Ex Parte* contact in contested on the record proceedings. In the PaPUC’s view, forbearance is essentially a contested on the record proceeding.

When serving a copy on the states, the PaPUC suggests that the FCC avoid imposing a formal “attestation of service” requirement. That term is a technical legal term of art. The ensuing litigation at the state or federal level over “compliance” with an “attestation of service” means more time and resources would be devoted to arcane procedural concerns as opposed to forbearance.

The PaPUC makes these recommendations based on experience. In the past, Petitioners seeking forbearance have often filed Petitions and supplemental information, typically in *Ex Parte* filings, without giving a copy to the state commissions. The state commissions learn of a proceeding or the *Ex Parte* filing with a very short time for analysis and comment. The press of other obligations and the last minute awareness operate to leave the state commissions with little time to respond. An FCC requirement that a Petitioner or proponent of forbearance provide a copy on the same day the filing is made at the FCC will alleviate this problem.

The PaPUC's experience has been that parties and the petitioner often file exhaustive supplemental data, information, or commitment submissions much later in the forbearance docket. As the PaPUC observed in Docket No. 04-440 (the Operation of Law Forbearance Decision), there were multiple *Ex Parte* filings with exhaustive information up until a few weeks before the statutory deadline. In that proceeding, the public is still uncertain about what forbearance the FCC granted the Petitioner. This arose because the Petitioner's forbearance pleadings varied over time and the forbearance became operational as a matter of law.

Finally, Forbearance Petitions and Supplemental Forbearance Filings often contain valuable and useful information. The state commissions should be given a copy and a formal opportunity to determine if they want to submit

filings that address circumstances within the state commission's respective geographic border.

The FCC should provide for state filings as part of the record supporting any Section 160(a)(1)-(3) findings. This is an important consideration because the FCC's decisions made under federal law have a state impact.

For example, in the Verizon Philadelphia-Pittsburgh Petition, the FCC's denial had a significant impact in Pennsylvania, particularly for competitors that relied on unbundled network element loops (UNE-Ls). Supplemental data, information, or filings in that petition could have altered a state commission's view of any proposed forbearance. This holds true for future petitions.

When *Ex Parte* filings are made very close to expiration of the pending deadline for a decision under Section 160(c), the state commissions are typically unaware of the filing or have little time to file an analysis. This is particularly true for controversial or very complex forbearance proceedings like the Philadelphia-Pittsburgh Petition.

A Petitioner that files additional substantive information should be held to a requirement that submission of supplemental filings will reset the statutory deadline under Section 160(c). There could be an exception in which the Section 160(c) timeline would not be reset if the additional filing is

an erratum or without “substantial” information.

In the alternative, the FCC could conclude that the submission of any data, information, or supporting documentation after expiration of the formal comment period warrants outright denial of the earlier Petition. In that case, the FCC would review the new information and the original Petition for “completeness” and determine if the combination filings constitute a *Prima Facie* showing under federal law. Following that decision, the FCC would then publish notice of the original Petition and the supplemental filing as a New Petition under Section 160.

2. *Prima Facie Case; Burden of Proof; Documentation of Compliance with Forbearance Tests.*

Prima Facie Case. The FCC should conduct a cursory review of the Petition and the accompanying documents to determine if the Petitioner has established a *Prima Facie* case. If the FCC finds that the Petition is complete and supports a preliminary finding that forbearance should be considered, the FCC would then publish the Petition in the Daily Digest like today and, in addition, in the Federal Register.

The fact that a Petitioner submits a completed filing may make the filing complete. There may be instances where the complete filing may not present enough evidence to support a *Prima Facie* case. In those instances,

the FCC could outright deny the Petition. In those instances where an application is complete and the filing evidence establishes a *Prima Facie* case, the FCC would set the filing for publication in order to consider whether forbearance is warranted.

In the alternative, the FCC could allow a filing party to submit whatever information they deem appropriate in support of forbearance under Section 160(a)(1)-(3) or 332(c)(1)(A). The FCC could then conduct a review of the filing and determine if the Petitioner established a *Prima Facie* case. The FCC could simply reject any filing that fails to meet the minimum forbearance showing. The FCC could publish the Petition in the Daily Digest and the *Federal Register*, officially “receive” the Petition, and order a Petitioner to provide a copy to the state commission.

Burden of Proof. The burden of proof should be on the Petitioner or proponent/supporter of forbearance. Otherwise, a Petitioner could simply make general and vague claims about competition, without documentation, that the interested public might be unable to analyze without data and information. By keeping the burden of proof on the Petitioner or proponent of forbearance, the Petitioner or proponent will have the appropriate incentive to provide the data and information needed to determine if forbearance is appropriate.

3. *Timeline for a Forbearance Decision.* Section 160(c) of the

Communications Act of 1934 requires the FCC to make a decision on a forbearance request within one year unless the FCC extends the period for an additional three months. The Section 160(c) timeline is triggered by the time the FCC “receives” a filing. Section 332(c)(1) does not contain the Section 160(c) limitation in which a petition is deemed granted if the FCC fails to act within one year.

The PaPUC recommends that the FCC “receives” a petition based on notice in the Daily Digest and the Federal Register. The PaPUC makes this recommendation because in that one-year period the FCC, the states, the Petitioner, and the interested public must evaluate complex data involving multiple issues. By defining what it means to “receive” a Petition, the FCC gives everyone the time needed to study the information and determine their respective views or further participation in a proceeding.

The PaPUC recognizes that the one year limitation is a statutory mandate. In the PaPUC’s experience, however, new information which supplements an original filing can and often does get filed in a time frame that is very close to the statutory deadline.

This pressures the FCC, the states, and the interested public to complete their evaluation of complex data involving multiple issues. The PaPUC thinks that a timely and orderly consideration of a forbearance request warrants a clear definition of what it means to “receive” a filing at

the FCC.

Alternatively, the FCC could adopt a position that any substantial filings after a date certain, perhaps the 90th day following notice in the Daily Digest and Federal Register, is an effective “refiling” of the original Petition that warrants outright rejection of the earlier Petition. Another approach could be for the FCC to conclude that submission of supplemental filings containing data, information, or supporting documentation effectively withdraws the original Petition.

In both cases, the FCC should reject the original Petition and republish the new Petition, consisting of the original Petition and supplemental filings, and set new public comment periods.

4. Protective Orders; State Commission Access to Proprietary Information.

The PaPUC is one of many state commissions operating in states that existed prior to or after the Constitution of 1787 created the national government. The state commissions operate with authority as co-sovereign states. The PaPUC and the state commissions are not commercial litigants or private parties.

The PaPUC and the other state commission should not have to execute proprietary agreements which are imposed on private parties to prevent

competitive harm. The state commissions do not compete with a Petitioner nor is the state commission a commercial party. However, the PaPUC recognizes that this constitutional structural theory and a Petitioner's fear of competitive harm must be balanced.

Alternatively, the PaPUC proposes allowing the state commission to file a brief summary paragraph statement agreeing to abide by the confidential nature of proprietary information submitted to the Petitioner and the FCC. This brief paragraph could be filed immediately following the Petitioner's submission of the filing with the FCC and the state commissions. Following that filing, the state commissions should immediately get access to the information. This approach would alleviate any concerns about the state commission's role in forbearance proceedings and facilitate state commission review.

5. *Procedures for State Commission Input.* The PaPUC proposes a formal process for allowing the state commissions to independently determine their view of the issues and what, if any, further state commission input is appropriate. The PaPUC, as explained above, supports requiring a Petitioner or proponent of forbearance to provide a copy to the appropriate state commission. The confidential information should be provided at the

same time or following the state commission's submission of a brief paragraph statement agreeing to treat the information as confidential.

The PaPUC, however, has not addressed to what extent that copy obligation should be imposed on all parties in every forbearance proceeding, particularly the opponents or trade association members involved in a forbearance proceeding. The PaPUC will address this, if at all, following review of the filed Comments.

The PaPUC is proposing a forbearance request review process that emphasizes state commission input as follows. First, the Petitioner or proponent files a complete Petition and gives a copy to the state commission at the same time the Petition is filed at the FCC. Following an FCC determination that the Petition is complete and that the Petition establishes a *Prima Facie* showing that forbearance is warranted, the FCC publishes notice in the Daily Digest and the *Federal Register* stating that the FCC received the Petition as of the date of publication.

The FCC determinations on the "Completeness" of the Petition and the *Prima Facie* showing are made within 60 days of filing. These preliminary determinations support a conclusion that the FCC "received" the filing. The FCC also posts a Comment and Reply Comment period coterminous with notice that the FCC "received" the filing. The Daily Digest and the *Federal*

Register publication means the FCC “receives” the filing and triggers the Section 160(c) timeline.

The Comment and Reply Comment period will expire no more than 90 or 120 days after publication. During that time, the state commissions analyze the data and information and determine what, if any, further action will be taken on the forbearance. The state commissions should have the option to file a Comment and Reply Comment on the established date.

If no supplemental filings are made, the state commission shall file their State Response 30 days after expiration of the Comment and Reply Comment period which would be 120 days after publication in the Daily Digest and Federal Register. The state commissions would determine what, if any, State Responses they have on the Petition. The state commission’s Comments, Reply Comments, or State Response give the state commission standing.

The Petitioner and any other interested member of the public can file a Reply to the State Response 30 days after the state commission files any State Response. This would be 150 days after publication in the Daily Digest and Federal Register. There would be no more supplemental filings, Comments, Reply Comments, State Responses, or Replies after the 150th day unless the FCC determines otherwise for good cause shown.

Any supplemental filing, including those determined to be appropriate by the FCC for good cause shown, will constitute a new Petition. The only exception would be for *errata* filings or filings that do not contain substantial information.

Any other filing is reviewed for completeness and a *Prima Facie* showing. Following that review, the FCC would again publish notice of the new Petition and establish another Comment, Reply Comment, State Response, and Reply deadline.

If there are no new filings, the FCC would analyze the record from Day 150 through Day 365. This includes the data, information, filings, Comments, Reply Comments, State Response, and Reply.

At any time from Day 150 through Day 365, the FCC can accept, reject, or take other action deemed appropriate. Any action by the FCC between Day 150 and Day 365 shall be in writing. At any time from Day 150 through Day 365, the FCC can request supplemental information, data, or considerations. Any substantial filing made in response to an FCC request made between Day 150 through Day 365 shall constitute a new Petition.

The failure to respond to an FCC request made between Day 150 and Day 365 shall constitute withdrawal of the Petition. Upon that constructive withdrawal, the Petitioner may file another Petition.

The FCC may accept, reject, or take other action on the Petition between Day 150 and Day 365. Any action by the FCC between Day 150 and Day 365 shall be in writing.

The FCC may, at any time between Day 150 and Day 365, reject a Petition for failure to establish forbearance under Section 160(c) or 332(c)(1), respectively. The FCC may, consistent with Section 160(c), extend the consideration period another 90 days. The FCC can take any action during the Extended Consideration Period that the FCC could take between Day 1 (date of publication in the Daily Digest) and Day 365.

6. *State Commission Authority and Section 160(e).* The PaPUC is very concerned about the impact of Section 160(e) and independent state law. Section 160(e) prohibits a state commission from applying or enforcing any provision that the Commission has determined to forbear from applying.

The PaPUC views Section 160(e) as only imposing a limitation on the state commission's exercise of federal law similar to what occurs with numbering prior to delegation. The PaPUC does not view Section 160(e) as a limitation on independent state law obligations. Section 160(e) does not address preemption or the FCC's authority to overturn independent state law.

For that reason, the PaPUC considers federal forbearance as not otherwise limiting independent Pennsylvania state law unless and until the FCC expressly preempts state law in a manner consistent with federal preemption. Section 160(e) is not a separate federal preemption authority separate and apart from any other provision of federal law authorizing the FCC to preempt the states.

The PaPUC takes this position for several important reasons. The PaPUC notes that recent forbearance proceedings before the FCC address matters like consumer complaints and network investment, to name a few. The PaPUC also notes that some carriers actually secured forbearance from a federal requirement to own at least some physical facilities as a precondition to getting Federal Universal Service Fund (FUSF) revenue support outlays.

These kinds of forbearance petitions are a far cry from the pro-competitive goals envisioned by the forbearance provisions in Section 160(a)(1)-(3) or Section 332. These petitions are actually more in the nature of a waiver request and they should be treated as such. But, unlike the waiver request that they are, these petitions raise very serious Section 160(e) issues.

The PaPUC urges the FCC to expressly hold that any forbearance granted under Section 160 does not obviate independent state laws. There is no need to stress the relationship between the FCC and the states by an

expansive interpretation of a forbearance Petition to deliver broader relief when a party can get that same relief with a more narrowly focused waiver request.

The PaPUC appreciates the opportunity to file these Comments.

Respectfully submitted,
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